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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Computer III Further Remand Proceedings:)	CC Docket No. 95-20
Bell Operating Company)	
Provision of Enhanced Services;)	
)	
1998 Biennial Regulatory Review --)	CC Docket No. 98-10
Review of Computer III and ONA)	
Safeguards and Requirements)	

COMMENTS OF EARTHLINK, INC.

EarthLink, Inc. ("EarthLink"), by its counsel, submits these comments in the above-referenced proceedings to update and refresh the record on the interplay between the Telecommunications Act of 1996 ("1996 Act"), the Computer Inquiry precedent of the Federal Communications Commission ("FCC" or "Commission"), and the developments in the Information Service Provider market since the FCC received comment on its January 30, 1998 Further Notice of Proposed Rulemaking ("FNPRM").¹ As explained herein, EarthLink urges the FCC to update its Computer III framework with clear, easily enforceable requirements to ensure that Internet Service Providers ("ISPs") can provide consumers the widest diversity of Internet access services on a timely and reliable basis.

¹ See Further Comment Requested to Update and Refresh Record on Computer III Requirements, Public Notice, CC Dkt. Nos. 95-20, 98-10, DA 01-620 (rel. March 7, 2001); *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Further Notice of Proposed Rulemaking, 13 FCC Rcd. 6040 (rel. Jan. 30, 1998) ("FNPRM").

INTRODUCTION AND SUMMARY

EarthLink is the second largest ISP in the United States today, providing over 4.7 million residential and business customers Internet access services. Significantly, close to 200,000 EarthLink customers are presently served with high-speed Digital Subscriber Line (“DSL”) services. As such, EarthLink has considerable experience with the ordering, provisioning and installation practices of telecommunications carriers, especially with respect to the use of carrier DSL services as an input to broadband Internet access service. While EarthLink acknowledges that the issues raised in this proceeding are broad, and of great importance generally to the provision of information services, EarthLink files these comments to address specific issues emanating from the Commission’s Computer III proceedings that pertain to the provision of Internet access, primarily with respect to DSL services. As the FCC has repeatedly stressed, DSL holds great promise for fulfilling FCC and Congressional goal of achieving competition among information service providers and consumer choice,² so long as ISPs (and ultimately, their customers) can obtain vital DSL service inputs on a fair, efficient and reliable basis.

The bedrock principles the FCC delineated in its Computer III decisions – equal access, nondiscrimination, and efficient unbundling – are just as, if not more, vital to consumers and ISPs today than when they were first adopted. Access to critical transmission inputs and related features on nondiscriminatory terms for competitive ISPs promotes competition, fosters

² See Telecommunications Act of 1996, Pub. L. No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157; *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd. 20912, at ¶ 6 (rel. Dec. 9, 1999) (“Line Sharing Order”); *In the Matter of Ameritech Corp., Transferor and SBC Communications Inc., Transferee; For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Second Memorandum Opinion and Order, 15 FCC Rcd. 17521, at ¶ 23 (rel. Sept. 8, 2000).

innovation, creates diversity and enhances choice. Nevertheless, the Computer III requirements need to be updated and streamlined to address the realities of today's marketplace. The FCC should clarify and simplify its regulatory framework to ensure that DSL services are reliably available, accessible and reasonably unbundled so that they may be used as an input for competitive ISPs to bring consumers choice and diversity in high-speed Internet access.

To offer ubiquitous DSL-based Internet access services today, ISPs such as EarthLink are almost completely dependent on the incumbent local exchange carriers ("ILECs"), especially the former Bell Operating Companies ("BOCs") and their affiliates. While EarthLink remains hopeful that sustainable DSL competition will ultimately emerge and thrive, creating pure market-based incentives for carriers, we are surely not there yet. Accordingly, in revamping Computer III, the FCC must address how the ILEC-ISP relationship may be improved to promote competitive ISP service deployment. EarthLink believes that the FCC should adopt clear "market efficiency obligations" for the BOCs and their affiliates to address: efficient and reasonable service unbundling; necessary Operation Support Systems ("OSS"); service installation, maintenance and repair issues; fair marketing practices; information dissemination and reporting obligations; and effective, self-enforcing remedies for non-compliance. With clear standards of conduct and expectations, the widest diversity of ISPs can compete to deliver timely and reliable advanced services to all Americans.

The adoption of streamlined Computer III market efficiency obligations will also serve to reduce the number of ISP-carrier disputes, reduce FCC administrative and investigative burdens, and alleviate resource-intensive enforcement efforts. In fact, given the rapid growth of the high-speed services market, and the resources necessary to deploy high-speed Internet services, unless there are easily verified compliance measures and swift and certain enforcement remedies, the

obligations will remain divorced from the practical realities ISPs face in obtaining critical service inputs from the ILECs. For these reasons, EarthLink urges that an updated Computer III regime will assist substantially in attaining Chairman Powell's goal of an FCC that is "efficient, effective, and responsive."³

I. FUNDAMENTAL COMPUTER III PRINCIPLES REMAIN VITAL FOR COMPETITIVE PRICES, INNOVATION, DIVERSITY OF SERVICES AND DEPLOYMENT OF ADVANCED SERVICES TO ALL AMERICANS

A. The Bedrock Obligations of Sections 201 And 202 Remain The Foundation For The Public Interest Principles Of Computer III

As Internet access migrates from dial-up services to emerging broadband DSL telecommunications services,⁴ it is imperative for the FCC to clarify the governing basic framework to ensure that as ISPs offer their broadband information services (that ride upon incumbent carrier networks), they are not hindered by lack of compliance with or confusion regarding basic carrier obligations. Unfortunately, while technology and markets have progressed, today's BOC regulatory positioning and rhetoric has sought to muddy applicable legal obligations under Computer III, resulting in poor or non-existent ONA/CEI reporting for DSL services, so-called "separate" affiliates unilaterally asserting that they are no longer subject to Computer III, and practices that are closed and discriminatory. Just as the FCC has spoken in numerous other contexts on the importance of competitive local exchange markets, it should act here to reinvigorate its Computer III regime to promote ISP competition.⁵

³ Opening Statement of Michael K. Powell, Chairman, FCC, Before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, March 29, 2001, at 1 ("Powell Testimony").

⁴ Analysts report that the DSL market captured more than 2.5 million subscribers by year end 2000, up from 38,000 subscribers in 1998, and predict triple-digit growth rates in the DSL market to continue through 2001. Association for Local Telecommunications Services, The State of Local Competition 2001, at 32 (Feb. 2001).

⁵ Line Sharing Order, 14 FCC Rcd. 20912; *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To*

As a threshold matter, the FCC should reiterate that presently, all former BOCs (also including the former GTE companies) and their affiliates, regardless of how they are structured, are subject to the obligations imposed under the FCC's Computer III precedent. The Commission has just recently stressed that it has not eliminated its "fundamental provisions" of the Computer Inquiry proceedings that competitive enhanced service providers should continue to have access to critical telecommunications service inputs.⁶ While some carriers have argued that their advanced services affiliates should be treated as non-dominant carriers for all purposes, presumably including the ability to act without regard to the FCC's Computer II and III requirements,⁷ the fact remains that the FCC has never released the BOCs or any of their affiliates from these vital obligations and should not do so now.

Indeed, the bedrock principles of Computer III – access, nondiscrimination, and efficient, reasonable unbundling – are just as, if not more important, today than when the FCC first adopted Computer III. A diversity of ISPs fosters consumer ISP choice, empowering consumers and allowing thousands of ISPs – big and small – to compete for customers. This competition serves to reduce Internet access prices, foster a diversity of service offerings, stimulate

Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Second Report, 15 FCC Rcd. 20913 (rel. Aug. 21, 2000) ("Second Report"); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 2000 WL 1128623 (rel. Aug. 10, 2000) ("Collocation Reconsideration Order").

⁶ *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, 1988 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules In the Interexchange, Exchange Access and Local Exchange Markets, Report and Order*, CC Dkt. Nos. 96-61, 98-183, at ¶ 12 (rel. Mar. 30, 2001) ("Unbundling Order").

⁷ See Letter from Gary L. Phillips, General Attorney, SBC Telecommunications Inc., to Dorothy Atwood, Chief, Common Carrier Bureau, FCC (Feb. 15, 2001).

innovation, and encourage better quality service.⁸ Perhaps most importantly, as the Commission has acknowledged, a landscape with competing ISPs offers the best hope to deploy advanced services to the broad array of diverse Americans, in furtherance of Section 706 of the Telecommunications Act of 1996 (“1996 Act”).⁹

While these principles flow directly from Sections 201 and 202 of the Communications Act,¹⁰ the FCC should elaborate on these core obligations through specific and enforceable objectives in the Computer III framework (e.g., as it has done previously with CEI and ONA) to ensure that entities that likely have very different bargaining power can form concrete and stable relationships. Indeed, experience demonstrates that without specific FCC guidance on key issues, the important goals of Sections 201 and 202 are not served because incumbent anticompetitive and discriminatory practices are used to leverage control of crucial telecommunications and related components to stifle competitive ISP service deployment. As a practical matter, in the absence of specific requirements, the enormous resource disparity between the BOCs and almost all ISPs means that there is no real, timely or effective recourse to the FCC complaint process so that such practices proliferate unchecked. By adopting specific, clear and enforceable rights and guidelines under Computer III, the FCC will reduce the number of disputes, minimize its administrative burden of making *ad hoc* enforcement determinations of

⁸ Consumers may choose an ISP based upon pricing (rates range from \$4.95/month for 150 hours/month with AT&T Worldnet, see www.att.com/worldnet, and up) or other factors such as customer service/technical support. There are hundreds of ISPs available in the DC area alone, see www.thelist.com.

⁹ See e.g., Second Report, *supra*, at ¶ 245; *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability; Request by Bell Atlantic-West Virginia for Interim Relief Under Section 706, or, in the Alternative, a LATA Boundary Modification*, Fourth Report and Order and Memorandum Opinion Order, 15 FCC Rcd. 3089, 3092, at ¶ 3 (rel. Feb. 11, 2000).

¹⁰ 47 U.S.C. §§ 201, 202 (2000). See also Unbundling Order, at ¶ 46 (“[A]ll carriers have a firm obligation under Section 202 of the Act not to discriminate in their provision of transmission service to competitive Internet or other enhanced service providers.”).

what conduct is unreasonable and/or discriminatory and reduce the burden on parties of complex, resource-intensive proceedings.

B. The Lack Of Broad-Based Local Competition Confirms and Underscores The Need For Strong, Effective Computer III Rules

While EarthLink certainly hopes that telecommunications competition will ultimately take hold and thrive, the fact is that a competitive market – for either voice or data – has not yet emerged to provide effective and ubiquitous telecommunications service options for ISPs. The unfortunate decline of many once-aspiring data competitive local exchange carriers (“CLECs”), most recently NorthPoint, has left ISPs without feasible alternative DSL providers today.¹¹ Indeed, even for those data CLECs that subsist, ISPs must question or at least consider the long-term viability of such DSL suppliers. Simply put, all ISPs, and especially ISPs such as EarthLink serving all consumers regardless of where they live or work, continue to be reliant on ILEC services, including for DSL. Clearly, not only is there is no factual basis to conclude that Computer III has lost any vitality with the advent (and decline) of CLEC competitors,¹² the evolution of the ISP industry highlights the positive public interest impact of basic access principles. With over 9,600 ISPs today, the FCC’s access-oriented rules have proved a success.

In any case, the FCC must recognize that ISPs are fundamentally in a different business than CLECs. Consequently, it makes little sense to assume that ISPs can rely on CLEC rights to ensure nondiscrimination and access to BOC services. While ISPs need telecommunications services to provide consumers their information service offerings, ISPs themselves are not

¹¹ See Corey Grice, *NorthPoint DSL Demise: A Lesson in Size*, CNET NEWS.COM, Mar. 30, 2001, at <http://news.cnet.com/news/0-1004-200-5405347.html> (describing demise of high-speed Internet access providers NorthPoint, Covad, and Rhythms NetConnections); John Borland, *NorthPoint Sale Leaves ISPs in DSL Lurch*, CNET NEWS.COM, Mar. 23, 2001, at <http://news.cnet.com/news/0-1004-200-5236935.html>.

¹² Cf. FNPRM, *supra*, at ¶¶ 29-36.

carriers by virtue of that fact.¹³ While some ISPs have chosen to affiliate with CLECs and some CLECs have chosen to form ISPs, the FCC should not require ISPs to form CLECs to pursue their core business endeavors or to partner with CLECs (or any other carrier) to obtain telecommunications service inputs.

Indeed, in assessing the current market conditions and considering its role, the FCC should acknowledge that the BOC mergers have left the BOCs even more powerful today than when Computer III began. The FCC's Computer III regime attempted to strike a balance of power between the BOCs and ISPs. To the extent the BOCs have become more powerful in the intervening years, Computer III must continue to reflect that balance. The fact is that the emergence of the potentially lucrative data and high-speed Internet access market has provided increased incentives and ability for BOCs to favor their affiliated ISPs.¹⁴ Today, the BOCs' ISPs dominate DSL offerings not necessarily due to superior service, preferred offerings or better rates but simply because they are able to structure their relationships with their parent companies to impede competitors.¹⁵ The market, not unchecked market power should determine success.

II. COMPUTER III SHOULD BE STREAMLINED AND UPDATED WITH SPECIFIC MARKET ENFORCEMENT OBLIGATIONS ("MEOs")

The ISP market can and should serve consumers with competitive offerings on the basis of the features of ISP services, including price, service quality, and service features; an ISP's

¹³ Federal-State Joint Board on Universal Service, 13 FCC Rcd. 11501 (1998) ("Report to Congress").

¹⁴ See George Chidi, DSL Financial Meltdown Means Fewer Choices, InfoWorld Daily News, Apr. 10, 2001. Numerous ISPs have alleged ILEC anti-competitive behavior in the provision of DSL services. See e.g., *SBC, ISPs Settle DSL Issues In Texas*, TR Daily, June 15, 2000; *In the Matter of Iglou Internet Services, Inc. v. BellSouth Telecommunications, Inc.*, Order, Case No. 99-484 (April 9, 2001).

¹⁵ For example, SBC Communications, Verizon Communications, BellSouth, and Qwest accounted for more than 1.7 million of the 2.3 million DSL subscribers at the end of 2000. Bells Are Making Strong Gains, WARREN'S CABLE REGULATIONS MONITOR, Feb. 12, 2000. In 4th quarter 2000, DLECs gained only 131,700 DSL subscribers, while the BOCs gained 534,000 subscribers. Id.

affiliation with a BOC, on the other hand, should not afford an unjustified competitive advantage for obtaining DSL or other necessary telecommunications services.¹⁶ To address better ISP concerns in today's market, EarthLink proposes several specific reforms of Computer III, referred to as "market enforcement obligations," or "MEOs." The FCC should codify the MEOs in the Code of Federal Regulations,¹⁷ as specific and updated federal rules that set forth the BOCs' Computer III obligations with precision will enhance understanding of and compliance with the pertinent obligations by all parties and, in turn, lead to fewer disputes.

A. Reasonable and Unbundled Telecommunications Services Offered Under Tariff

As the Commission has long recognized in its Computer Inquiry proceedings, all ISPs must have nondiscriminatory access to the telecommunications inputs, including DSL, offered by the BOC.¹⁸ Just last month, the Commission emphasized this commitment:

¹⁶ Compare Prodigy Communications Corp. News Release, *Prodigy Reports Third Quarter Financial Results; DSL Internet Subscribers Grew to 338,000*, Oct. 27, 2000, in which Prodigy President and CEO Charles Roesslein stated "Our national network and strategic relationship with SBC give us a solid foundation from which we will capitalize on our market position." See also, Prodigy Communications Corp. News Release, *SBC Unveils New DSL Internet Service/Compaq PC Promotion With Prodigy*, Sept. 1, 2000.

¹⁷ Currently, the specific Computer III obligations are not articulated in the FCC's rules, which makes them more difficult to ascertain and less accessible. Cf., 47 C.F.R. § 64.702.

¹⁸ Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), Report and Order, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (Phase I Order), recon., 2 FCC Rcd 3035 (1987) (Phase I Recon. Order), further recon., 3 FCC Rcd 1136 (1988) (Phase I Further Recon. Order); second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Recon.), Phase I Order and Phase I Recon. Orders, vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (California I); Phase II, 2 FCC Rcd 3072 (1987) (Phase II Order), recon., 3 FCC Rcd 1150 (1988) (Phase II Recon. Order), further recon., 4 FCC Rcd 5927 (1989) (Phase II Further Recon. Order), Phase II Order vacated, California I, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceedings, 5 FCC Rcd 7719 (1990) (ONA Remand Order), recon., 7 FCC Rcd 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (California II); Computer III Remand Proceedings; Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (BOC Safeguards Order), recon. dismissed in part, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); BOC Safeguards Order vacated in part and remanded, California v. FCC, 39 F.3d 919 (9th Cir. 1994) (California III), cert. denied, 115 S.Ct. 1427 (1995); Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Review - Review of Computer III and ONA Safeguards and Requirements, CC Docket Nos. 95-20; 98-10; Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040 (1998) (Computer III 1998 FNPRM); Report and Order, 14 FCC Rcd 4289 (1999) (Computer III March 1999 Order) (addressing part of Computer III 1998 Further Notice), recon., 14 FCC Rcd 21628 (1999) [hereinafter Computer III]. See id., 104 F.C.C.2d at 1019-20, ¶ 113 ("A carrier providing enhanced services through Open Network Architecture must unbundle key components of its basic

The internet service providers require DSL service to offer competitive internet access service. We take this issue seriously, and note that all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced service providers. . . . In addition, we would view any such discrimination in pricing, terms, or conditions that favor one competitive enhanced service provider over another or the carrier, itself, to be an unreasonable practice under section 201(b) of the Act.¹⁹

Nondiscriminatory and unbundled access to telecommunications inputs offered under tariff have been and should remain the cornerstones of Computer III.

Unfortunately, the persistence of anticompetitive BOC pricing practices is a serious threat to genuine ISP competition. While examples are numerous, EarthLink submits the following three examples of BOC DSL pricing practices that are today having a severe negative impact on the ISP market: price squeeze; discriminatory volume arrangements; and discriminatory conditions on price discounts. These practices undermine the Computer III competition goals and should be expressly prohibited.

Price Squeeze: Computer III reform should reaffirm the long-standing precedent that anticompetitive pricing, including price squeeze and predatory pricing, is inconsistent with the Communications Act and is contrary to the public interest.²⁰ Under well-established Commission precedent, “predatory pricing is ‘unjust and unreasonable’ and therefore prohibited

services and offer them to the public under tariff, regardless of whether its enhanced services utilize the unbundled components.”).

¹⁹ Unbundling Order, supra, at ¶ 46.

²⁰ The FCC has explained that a price squeeze can occur when an entity that provides both a retail product and a necessary input for providing that retail product possesses market power over the input. A price squeeze exists when the price of the input product is so high, relative to the price of the retail product, that competing providers of retail service are unable to make a profit....We have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable....We conclude, therefore, that federal tariffing of interstate DSL services, such as the one at issue here, is appropriate, and we will address any price squeeze concerns as they arise. *In the Matter of Ameritech Operating Companies Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region*, Order, 11 FCC Rcd. 14028, 14040, ¶ 20, n.44 (1996). *See In the Matter of GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd. 22466, 22483, ¶ 32 (1998).

by Section 201(b) of the Act.”²¹ Despite this precedent, BOC pricing of DSL and high-speed Internet access services strongly indicates that price squeeze and other predatory conduct persists. For example, for several months, one BOC offered DSL to ISPs at a rate of \$30.00 per month, or more, under volume arrangements with ISPs, at the same time as the BOC-affiliated ISP offered retail high-speed Internet access (plus DSL modem) for \$40 per month. This price differential of \$10 (= \$40-30) could not possibly have covered all of the BOC-affiliated ISP’s other variable costs of service. At a minimum, such other variable costs would include: Internet backbone service as well as ATM or Frame Relay service (estimated at \$8.00 per customer); DSL modem (\$199 value offered for free); email server and computer costs; advertising, marketing and administrative costs. EarthLink submits that the BOC accomplishes the DSL price squeeze by overcharging for DSL, which inflates the retail price of high-speed Internet service to the public and allows the BOC to use the DSL pricing as leverage against independent ISPs. Such discriminatory pricing and should be expressly forbidden.

Volume-Based Price Discrimination: Pricing arrangements labeled “Volume Discounts,” if not reflective of actual efficiencies, can also be used to discriminate against unaffiliated ISPs. Certainly, volume discounts are beneficial when justified, such as if there are certain per-unit cost savings associated with the provision of 10,000 DSL lines to a single Internet provider as compared with 10 DSL service arrangements to 1,000 providers. When volume price reductions do not reflect cost savings to the ILEC, however, the terms of the telecommunications service are tacit price discrimination against independent ISPs.²²

²¹ *In the Matter of PanAmSat Corporation, Complainant, v. Comsat Corporation – Comsat World Systems, Defendant, Memorandum Opinion and Order*, 12 FCC Rcd. 6952, 6957, ¶ 16 (1997).

²² Similarly, arrangements that impose penalties on the ISP if it fails to meet the volume commitments are just an accounting note for an ILEC-affiliated ISP, but these penalties are real money and liabilities for independent ISPs.

For example, EarthLink knows of no valid “efficiencies” that are achieved by the BOC to justify a further price discount between an ISP making a commitment for 30,000 lines per year and an ISP committing to 90,000 lines per year. In both cases, each ISP is a very high volume customer, and the BOC has avoided considerable marketing and related expenses through a direct, wholesale relationship with the ISP. So-called volume thresholds should not be tolerated as a mechanism to mask discrimination.²³ To effectuate better the Computer III and statutory prohibition on price discrimination, EarthLink urges the Commission to ensure that price discounts on volume-based services, including DSL, reflect justified cost savings.

Moreover, substantial ILEC DSL rate reductions, tied to excessively high volume commitments, can be used implicitly to favor BOC-affiliated ISPs. Today, BOC-affiliated ISPs sell more high-speed Internet access than independent ISPs, including Prodigy (44% owned by SBC), SBC Internet Services, Pacific Bell Internet, and Verizon.net.²⁴ There may be several reasons for this ISP market lead, some legitimate and some not. For example, the BOC-affiliated ISP enjoys the fact that when average residential and business consumers naturally inquire to their local phone companies about DSL or high-speed Internet offerings, the BOC directs the customer to its affiliated ISP. What is not legitimate, however, is for the BOCs to engage in significant “steering” and “slamming” practices regarding DSL services for customers of independent ISPs. These and other advantages provide the BOC-affiliated ISP with larger volumes of DSL orders. High volume-based price discounts can compound the effects of other discriminatory conduct with price discrimination.

²³ See ASI Terms and Conditions for provision of DSL service to ISPs, <http://www.pacbell.com/About/asi/adsl.doc>.

²⁴ See supra.

Unreasonable Commitments and Price Discrimination: Nor should the BOCs be able to tie prices for discounted telecommunications services to the ISP's concession to unreasonable terms. Such discounts amount to price discrimination because they inherently favor affiliated ISPs, who can always agree to such terms since the interest of the parent BOC is served. They also undermine the independent ISP's ability even to remain independent. EarthLink has repeatedly encountered examples of such unreasonable conditions tied to the BOC's lowest-price DSL offerings, including instances where: (1) the ISP must agree that the BOC is its exclusive provider of DSL services in the BOC's region; or (2) the ISP must cede all future control of the high-speed access customer relationship to the BOC, providing the BOC with end-user CPNI and the right to market services directly to the ISP's subscriber.

If nonaffiliated ISPs are ever to have competitive choices, they cannot grant the BOC an exclusive hold on their telecommunications supply, nor can they agree to allow the BOC to take control of the customer relationship. Indeed, for independent ISPs, conceding to such terms to the BOC would threaten their very ability to act in an independent manner from the BOC. Yet, by refusing to accept these onerous conditions, the ISP forfeits the low-price DSL service used by the BOC-affiliated ISP. The Commission should prohibit such unreasonable practices.

B. Functional Operations Support Systems (OSS)

ISP access to accurate and fully functional OSS is essential today, especially in the broadband market. ISPs today purchase broadband telecommunications in volume, such as DSL, and arrange for the installation and billing of those services directly with the ILEC. Tariffs and similar arrangements contemplate that ISPs will deliver thousands of installation and provisioning transactions per month to the ILEC. Yet, some BOC ordering systems force the ISP to input repetitive information for each order; require ISPs to interface through unreliable

and inefficient public Internet connections and across BOC firewalls; are not scalable for large quantity ordering; and provide inaccurate ordering and provisioning information that is passed along to consumers.

Fundamentally, the capacities of these ordering systems – one-at-a-time ordering through cumbersome means – are completely at odds with the volume-based DSL orders sold to ISPs. This causes a massive, inefficient allocation of the ISP's resources to address the BOC ordering process. Time spent trying to fix each and every mistaken order under the current BOC OSS systems also diverts precious ISP resources away from deploying mass-market advanced services. EarthLink's experience is that severe inefficiencies in the ordering process –including manual or rudimentary electronic ordering systems – slow down and, in many cases, completely frustrate the consumer's ability to obtain high-speed services to the public.

Moreover, EarthLink has also encountered examples of discriminatory conduct with BOC electronic ordering systems, such as: BOC-affiliated ISPs are able to process orders more quickly and smoothly than independent ISPs; BOC-affiliated ISPs have access to the multiple "feeder" systems to the OSS which often gives them more accurate information concerning orders, while independent ISPs do not have such access; and personnel at BOC-affiliated ISPs may change a customer's ISP immediately upon request, while customers of unaffiliated ISPs must go through a lengthy and cumbersome process to switch their preferred ISPs.

The Commission should require the BOCs to present an OSS system to all ISPs that is both efficient and nondiscriminatory, meeting several objective baseline criteria of reliability, functionality, scalability, and interoperability with other OSS/billing systems (e.g., API-to-API interfaces). Deployment of such efficient and nondiscriminatory OSS can be and is being done today by some carriers and BOCs, but not others, clearly demonstrating its feasibility and

economic reasonableness. Indeed, the technological feasibility of adequate OSS and API-to-API interfaces cannot be debated seriously, given the OSS available to CLECs. In any case, any incremental and modest burdens on the BOCs (and shared by ISPs) to offer OSS to ISPs are greatly outweighed by the benefits to consumers and to the BOCs themselves by the increase in revenues due to DSL orders.

The FCC should not allow BOC “footdragging,” which serves to delay DSL deployment and frustrate competition. To fulfill Congress’ and the Commission’s vision of deploying advanced services to all Americans,²⁵ BOCs and their affiliates must implement a fully electronic OSS that allows independent ISPs to place service orders in an efficient and reliable manner. The development of such OSS for ISPs has long been part of the Computer III objectives²⁶ -- it is now past time for the Commission to set forth more affirmative and specific obligations for DSL.

C. Transparent Installation, Maintenance & Repair

Under Computer III, the Commission has emphasized the principle of BOC installation, maintenance and repair intervals and processes that are transparent across all ISPs and across all BOC services.²⁷ EarthLink wholeheartedly supports that this transparency, if it can be implemented, will allow consumers to choose between ISPs based on the quality of the Internet services and market-driven competitive factors such as customer service, price, innovation, reliability, etc. When the BOC imposes disparities in installation, maintenance and repair, however, it has poisoned the competitive nature of the ISP market because the BOC then forces consumers to make purchase decisions based upon which ISP can provide the telecom service

²⁵ See Telecommunications Act of 1996, Pub. L. No. 104-104, Title VII, § 706, Feb. 8, 1996.

²⁶ *In the Matter of Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 97 (1993).

²⁷ See Computer III, 104 FCC 2d 958 at ¶¶ 147,161.

input most quickly (i.e., BOC-affiliated ISP) and not on the quality of the Internet services. BOCs should be obligated to provide unaffiliated ISPs with installation, maintenance, and repair services at the same quality and in the same time period as they provide them to their affiliated ISPs. Equal access to these services has long been a Computer III requirement so as to help ensure that competitive, unaffiliated ISPs can offer their customers support services of equal quality to those that the BOC's customers receive.²⁸

While nondiscrimination reporting is an important tool in the Computer III framework,²⁹ the current reporting obligations have been too weak, not enforced, and ineffective. EarthLink continues to experience a host of installation, maintenance and repair issues with the BOCs, such as: BOCs installing DSLAMs for the affiliated ISPs before DSLAMs are available for EarthLink and other independent ISPs; delays in the provisioning of DS3 circuits; BOC technicians leaving EarthLink customers in the middle of the job; BOC technicians repeatedly and inexplicably missing installation appointments for EarthLink customers; BOC technicians attempting to convert customers to BOC-affiliated ISPs; and BOC technicians disparaging EarthLink to its customers. In some cases, EarthLink customers facing these delay and incompetence tactics decide, regrettably, to purchase BOC DSL and ISP service simply to get it delivered on time.

Despite these experiences (and EarthLink is confident that it is not alone among ISPs experiencing these issues), the BOCs' quarterly reports do not reflect or adequately convey a true or accurate picture of these widespread provisioning issues. For the record, EarthLink notes that the current BOC quarterly ONA reports are a pathetic substitute for adequate assurance of the BOCs' installation, maintenance and repair obligations. As demonstrated by the attached reports

²⁸ See Computer III Order, 14 FCC Rcd. at 4298.

²⁹ See Computer III, 104 FCC 2d 958 at ¶¶ 192-193, FNPRM, 13 FCC Rcd 6040 at ¶¶ 114-116.

recently filed by the BOCs, the current quarterly reports are indecipherable,³⁰ inaccessible,³¹ and irrelevant. BOCs don't comply with the form or substance of the requirements in any case.

Accurate and current reported information are vital to detection of abuses, yet the current reporting system has failed on this critical task.³² The FCC should institute publicly available informational postings and self-enforcing reporting by the BOCs to ensure that transparent installation; maintenance and repair services are, in fact, implemented across all BOC services. These postings should be updated regularly and located in a uniform place across all BOC websites and on the FCC's website. The reports should present relevant data measuring provisioning intervals, such as: the number of missed installation dates; the number of orders with more than one "firm order commitment" date; the number of "trouble" reports; and the time to repair DSL services for customers of both affiliated and unaffiliated ISPs. The reports should be based on prior quarterly activity and presented on a state-by-state basis, with officer attestation to ensure more reliability. Finally, the services subject to reporting obligations should include DSL services and DS3 installations. Such relevant information would better encourage BOC self-regulation, employee training, corporate responsibility, and would yield quicker resolution of disputes that may arise between BOCs and ISPs.

³⁰ For example, in many cases, the reports do not even explain what metric (days or hours) the provisioning intervals are reported in.

³¹ For example, while some BOC reports are available through the FCC's website under CC docket 88-2, other BOC reports are unavailable.

³² In the Commission's 2000 Biennial Review -- Telecommunications Service Quality Reporting Requirements (CC 00-229), EarthLink agreed with the Commission that ILECs and their data affiliates should be required to report on installation and provisioning intervals for DSL services. See Comments of EarthLink, Inc., CC Dkt No. 00-229 (filed Jan. 9, 2001).

D. Reasonable Marketing Obligations

The FCC should reaffirm that the BOCs may not engage in marketing practices that are discriminatory, unreasonable and undermine enhanced services competition. These practices include: BOC “slamming” customers of other ISPs; BOC personnel disparaging independent ISPs in the DSL installation or ordering process; and telecommunications service ordering processes designed to be unequal and to disadvantage independent ISPs (e.g., ordering screens or telephone order menu options that favor BOC-affiliated ISPs).

EarthLink has experienced many instances of these unreasonable, outlandish BOC practices and submits that the BOCs are capable of these actions only because they are the predominant (or service bottleneck) provider of the telecommunications service. Certainly, for in the voice services area, such practices have already been declared unreasonable, anti-consumer, and are prohibited.³³ When BOCs bring these practices into the ISP market they are just as repugnant, causing ISP subscribers enormous consumer frustration and confusion. Moreover, these practices fundamentally undermine the Computer III “equal access” principle, because when consumers are wrongly “slammed” or “steered” by the BOC it wholly undermines the benefits of technical nondiscrimination between ISPs. The Commission should reaffirm this and clarify in its Computer III rules that such practices are illegal.

E. Strengthened Compliance Incentives and Enforcement Mechanisms

Perhaps most importantly, the FCC should provide more certain, swift and substantial penalties and enforcement mechanisms to address violations of Computer III. Without swift and

³³ *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, Third Report and Order and Second Order on Reconsideration*, 15 FCC Rcd. 15996 (2000). See also 47 C.F.R. § 51.205.

substantial enforcement, there is little incentive to comply with Computer III, especially where the obligations are not consonant with the BOCs' underlying business goals (such as providing ISPs functional OSS or constraints on overly-aggressive marketing tactics). Thus, the Commission should set forth bright-line enforcement mechanisms clearly discouraging BOC conduct that violates Computer III.³⁴ EarthLink has several suggested enforcement mechanisms.

First, for the most serious violations of Computer III, such as where the BOC has engaged in price discrimination or failed to offer functional OSS, the FCC should order the BOC to cease operations under the Computer III integrated telecom/ISP provider until such time as the BOC has compensated the ISPs subject to such harm and the BOC can show that such conduct will not recur. It is only appropriate for the FCC to revoke the BOC's privileges under Computer III after a finding of serious violations because the premise of Computer III has always been to allow integrated BOC information and telecommunications services *only so long* as the BOC complies with adequate safeguards. Once it has violated the terms of Computer III and shown that it cannot live up to the safeguards, then the BOC's operations should be subject to Computer II regulation (i.e., complete separation of enhanced and telecommunications services) until such time as the BOC demonstrates it can operate within the Computer III safeguards and it has repaired the damages inflicted on competing ISPs.

Second, the FCC should also adopt specific and substantial penalties for failure to abide by informational posting requirements, including forfeitures that increase as non-compliance increases and persists. As discussed above, the BOCs' noncompliance with current CEI posting requirements, and the pathetic level of reporting on installation and repair issues is open for all to

³⁴ Powell Testimony, supra.

see.³⁵ Yet, the BOC misconduct continues. At a minimum, we suggest per-diem fines starting at \$50,000 for failure to comply with the simple and straightforward Computer III reporting obligations. Escalating and daily FCC penalties for violations would provide the BOC with incentive to rectify noncompliance and to take the Computer III posting obligations more seriously.

Third, to facilitate prompt redress and to create additional compliance incentives for BOCs, FCC should institute an enforcement process whereby the ISP could obtain temporary injunctive or remedial relief where the ISP demonstrates a “likelihood of success on the merits” and “irreparable harm” in a Computer III enforcement action.³⁶ Thus, the Enforcement Bureau would be empowered to issue a temporary order for BOC to cease the practices in question, which may include ceasing all new marketing and orders for BOC-affiliated ISP services, until the Bureau has resolved the matter. Likewise, once the ISP has made a *prima facie* case that the BOC has violated Computer III, then the burden of production should shift to the BOC to demonstrate affirmatively that it is in compliance³⁷ and the BOC conduct should not be presumed reasonable.³⁸ These measures to improve the enforcement process are essential

³⁵ BOCs are currently required to file CEI plans for their Internet Access services, however SBC files only one Internet Access CEI Plan (in the state of Texas) throughout its entire thirteen-state region. See <http://www.sbc.com/PublicAffairs/PublicPolicy/CEIplans/NetAccCEI.doc>. Moreover, SBC’s affiliates PacBell and Ameritech merely link their website to this Texas CEI plan, rather than offering their own CEI plans for ISPs wishing to provide services in California or Ameritech’s five-state region. See <http://www.pacbell.com/About/0,1109,,00.html> and <http://www.ameritech.com/content/0,3086,7,00.html>.

³⁶ See *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir 1977); *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921 (D.C. Cir. 1958).

³⁷ See, e.g., *Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act*, First Report and Order, 11 FCC Rcd. 21905, ¶¶ 345-51 (1996) (Commission adopts burden of production shift to RBOCs in Section 271/272 complaints, finding that burden shifting improves expeditious resolution of complaints and better ensuring local competition laws).

³⁸ *Id.*, at ¶ 351 (Commission eliminates presumption of reasonableness of RBOC conduct in Section 271 complaints).

because ISPs, in general, do not have the resources to litigate a host of Computer III noncompliance issues through either the FCC's traditional or accelerated docket complaint process.

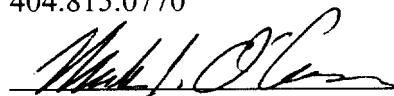
Finally, EarthLink believes that the FCC Enforcement Bureau's Investigations and Hearings Division should also conduct periodic, random audits to evaluate compliance of the Computer III informational posting and related requirements.

CONCLUSION

For the forgoing reasons, EarthLink urges the Commission to update the Computer III rules quickly to preserve a vibrant ISP market, as consumers demand high-speed Internet services via DSL and other BOC controlled telecommunications services.

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Date: April 16, 2001

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